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The Dominant Water Estate

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THE DOMINANT WATER ESTATE

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The United States and other common law countries have a rich tradition of protecting property rights in land. In fact in earlier times these land rights included water as part of the right. Remnants of this are still visible in the riparian rights doctrine for surface water and in some ground water doctrines. Traditionally land use practices were protected even when they interfered with water usage. But in dry areas the dominance of land rights over water rights does not make sense. Water is more valuable than land in arid locations. Shouldn't water be protected from land use practices that interfere with water uses? If water rights were dominate over land rights, would more water be conserved or would water be put to more efficient uses? Mineral rights can be severed from other land rights, and when they are the right to develop the mineral is included with the mineral right. This makes the mineral estate dominant. If water rights were dominant over land rights, land uses that impacted water would only be allowed if there was also an accompanying water right. The basis for this already exists in many western states where the state or the public is considered the original possessor of all water rights. Individual uses and rights are allowed but only under a state permit system. My paper examines the concept of the dominant water estate and explores what this would mean for increasing water supplies.

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